

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-2091
77-2091

-----x
WIDELTO LEYVA,

Petitioner-Appellant

-against-

SUPERINTENDENT, GREENHAVEN CORRECTIONAL
FACILITY,

Respondent-Appellant
-----x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK.

A P P E N D I X

LOUIS R. ROSENTHAL
Attorney for Petitioner-Appellant
16 Court Street
Brooklyn, New York 11241
(212) 855-2600



PAGINATION AS IN ORIGINAL COPY

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PLAINTIFFS

APPEAL

0719

DEFENDANTS

LEYVA, WIDELTO

WIDELTO LEYVA

SUPT., OF GREENHAVEN PRISON

SUPERINTENDENT, GREENHAVEN
PRISON

CAUSE

22 U.S.C. § 2254
HABEAS CORPUS

ATTORNEYS.

FOR PLTFF:
WIDELTO LEYVA Pro Se #20297
Drawer B
Stormville, N.Y., 12582

and

Louis R. Rosenthal
16 Court Street
Brooklyn, New York 11241
855-2600

11:20 AM
1605-1

(1)

LEYVA VS SUYPT?, GREENHAVEN PRISON

DATE	MR.	PROCEEDINGS	
1-21-76		Petition for a writ of habeas corpus filed.	(1)
3-17-76		By NEAHER, J.- Order to show cause dtd. 3-16-76 why a writ should not be issued etc., Copies mailed filed.	(2)
4-8-76		Affidavit of Rhonda Amkraut Bayer in opposition to application for writ of habeas corpus filed.	(3)
4-19-76		Memorandum of Law in support of petitioner's application for a writ of habeas corpus filed.	(4)
5-11-76		By NEAHER, J.-Order for appointment of counsel filed. (CJA 20) Copy mailed to Adm. Office,	45xz (5)
3/7/77		BY NEAHER, J. MEMORANDUM ORDER dtd 3/4/77 denying petition for Habeas corpus. filed. Copy of order mailed to petitioner's atty. and to Atty. Gen.. attention RHONDA AMKRAUT BAYER, ESQ.	(6) lg
3/7/77		Clerks judgment entered, ordered that petitioner take nothing of the respondent and that the petition for a writ of habeas corpus is denied.	(7)
3-10-77		Voucher reappointment filed. Copy to AO.	(8)
3/11/77		Notice of appeal filed. Mailed copy of Notice of appeal to C. of A. and docket sheet.	(9) l
6-27-77		Notice of motion ret 7-8-77 for an order re certificate of probable cause filed. mg	(10)
6/30/77		Affidavit in opposition to motion for certificate of probable cause of Mark C. Rutzick filed. t k.	(11)
8-1-77		By NEAHER, J. - Memorandum Order dtd 7-28-77 granting a certificate of probable cause filed. (copies mailed to attys). mm	(12)
8/31/77		Record on appeal certified and mailed to court of appeals	

8/31/77

Sted Lusa

(2)

PETITION FOR WRIT OF HABEAS
CORPUS BY PERSON IN
STATE CUSTODY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WIDELTO LEYVA #20297

Full name and prison number (if any)
of Petitioner

Case No. _____
(Clerk to supply)

vs.

SUPERINTENDENT GREENHAVEN PRISON

Name of Respondent

INSTRUCTIONS—READ CAREFULLY

To be considered by the District Court, this petition must be in writing (*legibly handwritten or typewritten*), signed by the petitioner and verified (*notarized*). Answers to each applicable question must be concise. If the space is too small for the answer to a particular question, finish it on the reverse side of the page or insert an additional blank page, making clear to which question the continued answer refers.

Every petition for habeas corpus must be sworn to under oath. A false statement of a material fact in the petition may be made the basis of prosecution and conviction for perjury. Petitioners should take care that their answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information that will establish whether petitioner will be unable to pay the fees and costs of the habeas corpus proceedings.

The execution and filing of this form shall be deemed a complete substitution for any and all papers heretofore filed in this Court for the same relief.

When the petition is completed, the original and one copy shall be mailed to the Clerk of the District Court for the Eastern District of New York.

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①

1. Place of detention GREENHAVEN DETENTION FACILITY - STORMVILLE, N.Y.
2. Name and location of court which imposed sentence Supreme Court, Kings
County, Brooklyn, New York
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
6416/71
(a) _____
(b) _____
(c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
(a) September 29, 1972; 15 years to life imprisonment
(b) _____
(c) _____
5. Check whether a finding of guilty was made
(a) after a plea of guilty _____
(b) after a plea of not guilty X
(c) after a plea of nolo contendere _____
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
(a) a jury X
(b) a judge without a jury _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list
(a) the name of each court to which you appealed:

(4)

i. Supreme Court, Appellate Div. - 2nd Dept.

ii. Court of Appeals, State of New York

iii.

(b) the result in each such court to which you appealed:

i. Affirmed, no opinion

ii. Unanimously affirmed with opinion

iii.

(c) the date of each such result:

i. October 2, 1974

ii. December 4, 1975

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

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(c)

10. State concisely all the grounds on which you base your allegation that you are being held in custody unlawfully:

Two key police witnesses against me were convicted in this Court (a) of violation of Civil Rights of defendants. In addition, the Assistant D.A. who testified against me was under suspicion and I have reason to believe that he testified before a Federal Grand Jury in return for immunity. I was not permitted to raise these points in the State Court of Appeals.

POINT I - There was no probable cause to arrest appellant Leyva (c) and search the automobile in which he was a passenger; POINT II - The informant's identity should have been disclosed and his credibility tested in Court; POINT III - Prosecutor's comments with respect to defendant rebutting presumption and Judge's explanation constituted reversible error; and POINT IV - The evidence was not sufficient to establish appellant Leyva's guilt beyond a reasonable doubt.

(b)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a)

(b)

(c)

12. Prior to this petition have you filed with respect to this conviction -

(a) any motion in State court for a new trial? NO

(b) any petition in State court for a writ of error *coram nobis* or any motion in the nature of *coram nobis*? NO

(c) any petitions in State or Federal courts for habeas corpus? NO

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(e) any other petitions, motions or applications in this or any other court? NO

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13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

⑤

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? YES

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

- POINT I - There was no probable cause to arrest appellant Leyva and search the automobile in which he was a passenger; POINT II - The informant's identity should have been disclosed and his credibility tested in Court; POINT III - Prosecutor's comments with respect to defendant rebutting presumption and judge's explanation constituted reversible error; POINT IV - The evidence was not sufficient to establish appellant Leyva's guilt beyond a reasonable doubt.

(b) the proceedings in which each ground was raised: able doubt.

- i. Direct Appeal _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ground with respect to corrupt police officers was raised in petitioners brief, but Court of Appeals granted District Attorneys motion to strike that ground from the brief.

(b)

(c)

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17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Mr. Ellison, Legal Aid Society, 26 Court Street, Brooklyn,
New York

ii. Louis R. Rosenthal, 16 Court Street, Brooklyn, New York

iii.

(b) the proceedings at which each such attorney represented you:

i. Trial

Appeals

ii.

iii.

(C)

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)?

Widelto Leyva
Signature of Petitioner

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WIDELTO LEYVA

being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Widelto Leyva
Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

7 day of Jan. 1976
(month) (year)

Richard L. Middlebrook
Notary Public

My commission expires

(month)

(day)

(year)



FORMA PAUPERIS AFFIDAVIT
(see instructions, page 1 of this form)

I have been incarcerated since the day of my arrest on September 22, 1971. I have no funds and have always been represented by Legal Aid or Assigned Counsel. My family has no funds with which to help me and I own no property.

Widelto Leyva
Signature of Petitioner

ss

WIDELTO LEYVA

, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Widelto Leyva
Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

3 day of JAN, 1976
(month) (year)
Richard L. Middlebrook
Notary Public

My commission expires

RICHARD L. MIDDLEBROOK

Notary Public
Dutchess County

My Comm. Expires Mar. 31, 1977

(month)

(day)

(year)

(12)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA ex rel.
WIDELTO LEYVA,

No. 76 C 131

Petitioner,

ORDER TO SHOW CAUSE

-against-

SUPERINTENDENT, GREENHAVEN
PRISON,

Respondent.

X

Upon the petition for issuance of a writ of habeas corpus, dated 1/21/76, a copy of which is attached, it is ORDERED that:

(1) The Attorney General of the State of New York, as attorney for the Respondent, show cause before this Court by the filing of a return to the petition, why a writ of habeas corpus should not be issued;

twenty (20)

(2) Within ~~ten (10)~~ days of receipt of this order, the Attorney General of the State of New York shall serve a copy of his return on the petitioner herein and file the original thereof, with proof of such service, with the Clerk of this Court;

(3) If the transcript of the trial be available, the Attorney General of the State of New York is directed to submit such transcript and record to this Court at the time of the filing of such return;

twenty (20)

(4) Petitioner, within ~~ten (10)~~ days of the receipt by him of a copy of the return of the Attorney General, shall file his reply, if any, with the Clerk of this Court, in duplicate;

(5) Service of a copy of this order shall be made by the Clerk of this Court by mailing a copy thereof, together with a copy of the petition, to the Attorney General of the State of New York, 2 World Trade Center, 47
New York, ~~40 Rector Street~~, New York, N. Y. 10013 and by mailing a copy of this order to the petitioner.

Dated: Brooklyn, New York,

13.
Edward R. Neaher

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
CLERK'S OFFICE
DISTRICT COURT E.D. N.Y.
★ APR 8 1976 ★
11:41 A.M.
P.M.

UNITED STATES ex rel. WIDELTO LEYVA, :

Petitioner, : AFFIDAVIT IN
: OPPOSITION

-against- :

SUPERINTENDENT, Green Haven :
Correctional Facility, :

76 C 131

Respondent. :
-----X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

RHONDA AMKRAUT BAYER, being duly sworn, deposes and
says:

1. I am a Deputy Assistant Attorney General in the
office of LOUIS J. LEFKOWITZ, Attorney General of the State of
New York, attorney for respondent herein. I submit this
affidavit in opposition to petitioner's application for a writ
of habeas corpus.

2. Petitioner was convicted of Criminal Possession
of Dangerous Drugs in the First Degree and Fourth Degree and
sentenced to a term of imprisonment of 15 years to life on the
First Degree and a concurrent 3 year term on the Fourth Degree
conviction in Supreme Court, Kings County.

3. Petitioner appealed the judgment to the Appellate
Division, Second Department, which affirmed on October 2, 1974.
Leave to appeal was granted by the Court of Appeals which
unanimously affirmed on December 4, 1975.*

* A copy of the Court of Appeals' opinion is annexed.

(14)

4. The instant application is based on petitioner's claims that:

(a) There was no probable cause for his arrest and subsequent search of the automobile in which he was a passenger;

(b) the informer's identity should have been disclosed;

(c) the prosecutor's comments on the Court's explanation regarding a statutory presumption constituted reversible error;

(d) the evidence did not establish his guilt beyond a reasonable doubt.*

5. Initially, it should be noted that none of petitioner's claims are supported by factual allegations. Mere conclusory allegations are insufficient to raise claims cognizable in federal habeas proceedings. Johnson v. Zerbst, 304 U.S. 458 (1938); United States ex rel. Holes v. Mancusi, 423 F. 2d 1137, 1142 (2d Cir. 1970); United States ex rel. Posen v. Follette, 409 F. 2d 1041, 1045 (2d Cir.) cert. den. 398 U.S. 930 (1970).

* Petitioner also claims that two police witnesses were convicted of Civil Rights violations and that the Assistant District Attorney was under suspicion. He further claims these points were raised in the Court of Appeals but struck from his brief. Firstly, these were not claims made in petitioner's brief to the Court of Appeals. The District Attorney moved to strike the last paragraph on page 23 of petitioner's brief to the Court of Appeals. A copy of the argument section of this brief is annexed hereto. The offending paragraph was included in petitioner's argument for the disclosure of the informant's identity. The motion to strike this paragraph was made on the grounds that a witness' credibility may not be attacked on appeal upon allegations having no bases in the record below. Moreover, claims not made in the Appellate Division cannot be raised for the first time in the Court of Appeals. Further, the credibility of witnesses does not raise an issue of federal constitutional dimensions but is a question for resolution by the trial jury.



6. In any event, this petition should be dismissed on the merits. Prior to trial a hearing was held on petitioner's motion to suppress evidence. The testimony adduced at this hearing as well as at the trial was summarized in the respondent's brief to the Court of Appeals. A copy of this portion of the People's brief is annexed hereto. The findings of the State court made after a full evidentiary hearing at which petitioner was represented by counsel is entitled to a presumption of correctness. 28 U.S.C. § 2254(d); La Vallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Sabella v. Follette, 432 F. 2d 572 (2d Cir. 1970).

7. Officers charged with the enforcement of the law are privileged to withhold from disclosure the identity of persons who furnish information of criminal offenses. Scher v. United States, 305 U.S. 251, 254 (1938); In re Quailes v. Butler, 158 U.S. 532 (1895); Vogel v. Cruaz, 110 U.S. 311, 316 (1884). The application of this privilege is limited where "the disclosure of an informer's identity or the contents of his communication is relevant and helpful to the defense, or is essential to a fair determination of a cause." Poviaro v. United States, 353 U.S. 53, 61 (1956). See also United States v. D'Angiolillo, 340 F. 2d 453, 455 (2d Cir. 1965), cert. den. 380 U.S. 955 (1965); United States v. Roberts, 368 F. 2d 646, 649 (2d Cir. 1968); United States v. Jones, 360 F. 2d 92 (2d Cir. 1966); United States v. Cohen, 339 F. 2d 183 (2d Cir. 1964). Where the defense failed to sustain their burden of showing that disclosure would serve any necessary or useful function. E.g. United States v. Ordega, 471 F. 2d 1350 (2d Cir. 1972) cert. den. 411 U.S. 935; United States v. Alvarez, 472 F. 2d 111 (9th Cir. 1973) cert. den. 412 U.S. 921 (1973); United States v. Kelly, 449 F. 2d 329, 330 (9th Cir. 1972).



In this case, the informer was not the sole participant in the transaction. (Coviano v. United States, supra) nor did he significantly participate in events which formed part of the crime charged, (United States v. Coke, 339 F. 2d 183 [2d Cir. 1964]), nor did he witness the crime (E.g. United States v. Russ, 362 F. 2d 843 [2d Cir. 1966]).

"[W]here the issue is one of probable cause disclosure of 'the identity of an informer is not constitutionally required even though his information is the sole basis for probable cause.' United States v. Commissioner, 429 F. 2d 834, 837 (2d Cir. 1970). See also United States ex rel. Coffey v. Fay, 344 F. 2d 625, 633 (2d Cir. 1965), aff'd after remand 356 F. 2d 460 (2d Cir. 1966) (per curiam)." Mapp v. Warden, F. 2d (Slip op. 2675, 2683) (2d Cir., March 16, 1976, Docket No. 75-2119).

See also United States v. Clark, 483 F. 2d 103 (5th Cir. 1973); United States v. James, 466 F. 2d 475 (D.C. Cir. 1972); United States v. Skeens, 449 F. 2d 1066 (D.C. Cir. 1971).

8. In this case, the record presents irrefutable confirmation of the accuracy of the informer's report. His information was specific and detailed. The police and Assistant District Attorney Hershey were able to corroborate virtually all of the information he provided prior to the arrest; that a 1969 gold Chevy with Florida license plates would be on the Brooklyn side of the Williamsburg Bridge at 4 p.m. on September 22, 1971 and that Carmen Garcia would be in the car. (M: 4-6, 9-16). The arrest cards and search warrant affidavits were supplied to the trial court to substantiate Detective Viera's testimony that there had been numerous arrests resulting from prior information given by this informer. The trial court found eleven such arrests (M: 611). The names of four defendants who had been convicted on the basis of information provided by

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the same in-mer were furnished to the al court (M: 305, 312). This evidence was more than sufficient to give assurance of the informer's reliability. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969); Mapp v. Warden, supra; United States v. Elgisser, 334 F. 2d 103 (2d Cir. 1964).

Moreover, the establishment of probable cause in this case did not turn solely on the arresting officer's testimony concerning the contents of the informant's tip. This testimony was corroborated by Assistant District Attorney Hershey who had also spoken with the informant about the defendants' forthcoming transgressions. Police verification of information supplied by an informant with a previous track record of reliability was sufficient to establish probable cause. Draper v. United States, 358 U.S. 307 (1959); McCray v. Illinois, 386 U.S. 300 (1967). So, too, the circumstances provided probable cause for the search of the automobile. Chambers v. Maroney, 399 U.S. 42 (1970).

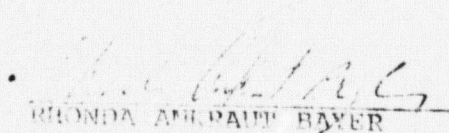
9. Petitioner's third claim, that the prosecutor's comments and the court's explanation regarding a statutory presumption should be dismissed for failure to present a claim cognizable in a habeas corpus proceeding. Only federal constitutional claims may be presented on such a collateral attack. Even were the instant petition construed to present a claim based on a federal constitutional right, it is clear that the claim was not presented to the State court on federal constitutional grounds. (Appellant's Brief, pp. 24-26). Thus, this claim must be dismissed for failure to exhaust available state remedies. E.g. Picard v. Connor, 404 U.S. 270 (1971).

Petitioner claimed that the Assistant District Attorney argued in summation that a defendant must testify to rebut the

presumption with respect to possession of drugs in an automobile. The record contains no such comment by the prosecutor or the judge that petitioner would have to take the stand in his own defense. The Court specifically advised the jury that if the People had not proven beyond a reasonable doubt that the cocaine was present in the car when the defendants were arrested, the People were not entitled to the presumption and their case would fail (179-180).

10. Petitioner's last claim regarding the sufficiency of the evidence, likewise was not raised in State court on any federal Constitutional ground. Further, the sufficiency of the evidence is essentially a question of State law and not of constitutional dimensions. Garner v. Louisiana, 368 U.S. 157, 163 (1961); Thompson v. Louisville, 326 U.S. 199, 206 (1960); United States ex rel. Terry v. Henderson, 462 F. 2d 1125, 1131 (2d Cir. 1972); United States ex rel. Griffin v. Martin, 409 F. 2d 1300, 1302 (2d Cir. 1969).

WHEREFORE, respondent respectfully requests that the petition be dismissed in all respects.


RHONDA ANLAUF BAYER

Sworn to before me this
6th day of April, 1976.

Assistant Attorney General
of the State of New York

19

To be argued by
LOUIS R. ROSENTHAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA EX REL
WIDELTO LEYVA,

76 CIV 131

Petitioner

-against-

SUPERINTENDENT, GREENHAVEN PRISON,

Respondent

-----X

MEMORANDUM OF LAW IN SUPPORT
OF PETITIONER'S APPLICATION
FOR A WRIT OF HABEAS CORPUS

LOUIS R. ROSENTHAL
Attorney for Petitioner
16 Court Street
Brooklyn, New York 11241
(212) 855-2600

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I N D E X

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THE COURT HAS JURISDICTION BECAUSE
PETITIONER HAS EXHAUSTED STATE
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POINT II

THE USE OF PERJURED TESTIMONY
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POINT III

PETITIONER WAS DENIED HIS FOURTH
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POINT IV

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PRELIMINARY STATEMENT

This is a petition pursuant to 28 U.S.C. X 2241-2254 for a Writ of Habeas Corpus. Prisoner is presently incarcerated in Green Haven Correctional Facility, Stormville, New York. The essence of the petition is that Widelto Leyva was denied due process of law, as guaranteed by the Fourteenth Amendment, by the use of perjured testimony against him and a New York Statute which rebuttably presumes that one present in an automobile where drugs are found is in knowing possession of the drugs. In addition, petitioner was denied his Fourth Amendment right to be free from unreasonable search and seizure. This Court has jurisdiction to hear the instant application since petitioner has exhausted all available state remedies in satisfaction of 28 U.S.C. Section 2254 (b) and (c) and, for the above reasons, the application of Widelto Leyva should be granted.

STATEMENT OF FACTS

Petitioner, WIDELTO LEYVA and his co-defendants CARMEN GARCIA and JOSE LOWE were charged with the crimes of criminal possession of a dangerous drug in that they possessed approximately thirty-three ounces of cocaine on September 22, 1971 with the intent to sell the same.

A hearing on a motion to suppress was held prior to the trial by jury.

THE TESTIMONY AT THE SUPPRESSION HEARING

Detective Raymond Viera, of the Narcotic Division of the New York City Police Department, testified that on September 22, 1971 at 1:00 P.M. he was in the Kings County District Attorney's Office with Assistant District Attorney Martin Hershey and received a telephone call from a person whose voice he recognized (1-3). The caller told Viera that CARMEN GARCIA would be in a gold Chevrolet with Florida license plates on the Brooklyn side of the Williamsburgh Bridge at 4 P.M. that day with a male, 5'10", 160 lbs.; with a heavy beard and that they would have a kilo of cocaine with them in a brown manila envelope (4).

Viera stated that he had known the informant for three years and had been given information by the

informant that had resulted in arrests (7). The detective left the D.A.'s office with other detectives and with Assistant District Attorney Martin Hershey and proceeded to the Williamsburgh Bridge (9). At the bridge he observed and stopped a 1969 gold Chevrolet with Florida license plates (10). The appellant LEYVA, CARMEN GARCIA (seated in the middle) and the defendant LOWE, seated on the passenger side were in the car (11-12). Viera saw a manila envelope on the floor of the auto, opened it, decided it was cocaine and arrested the three passengers (10).

On cross examination the witness stated that he removed the envelope before the three persons left the car (24). Detective Viera testified that his conversation with the informant was unrecorded but that Assistant District Attorney Martin listened in to part of the conversation (26-27). Viera refused, over objections, to reveal the name of the informant or to supply any information as to his involvement in drug traffic except that the informant was uncompensated (29-31) and supplied information which ended in eleven arrests and eleven convictions (33). Throughout his testimony Viera displayed total confusion as to the number of arrests and convictions made on information by the informant. Viera said that the informant did not know who Carmen Garcia and the one other

male were going to meet, did not know the license plate number of the vehicle, did not know who the male passenger was, but did say that the car was owned by a person from Florida (37-41).

At first Viera said that he removed the envelope of drugs from the car before the occupants left the car (24). He said he removed the envelope after ordering the male in the passenger side to exit from the car (55-56). He said that he held the man with his left hand while retrieving the envelope with his right hand (59). He described the envelope one-half inch thick, measuring 9"x 12" and located partly under the seat, to the right of center with three to five inches showing. It had no writing on it (56-58). Viera saw two clear plastic envelopes full of white powder in the manila envelope and arrested the defendants (62).

Later that day he arrested a man, CEPARO, at the Cornish Arms Hotel in West 23rd Street in Manhattan (62-63) in connection with this case.

Viera changed his prior testimony that the informant had called at 1:00 P.M. by stating that it was at 2:00 P.M., that the informant called at the District Attorney's Office (70-71). Detective Viera again refused to give the informant's name (71-72).

Viera was unsure as to the seating arrange-

ment of the defendants in the car other than CARMEN GARCIA being in the middle (79). At first he stated that LOWE was a passenger and LEYVA was the driver (10-12). The defendants did not respond when he asked to whom the envelope belonged and the envelope was not checked for fingerprints (88).

Viera reaffirmed that the informant was a registered Police Department informant, that a registry, which he had not seen, was kept of all police informants, that the informant was assigned a number known to Viera and that he was certain that a record was kept of the information given as to the informant and the defendants. (93-99). However, the Court sustained the prosecutors objection to a defense counsel's request to produce the registry and the repeated request to disclose the name of the informant (101).

Viera contended that there was not enough time in this case to obtain a search warrant but that he had seen fit to secure search warrants in other cases in which convictions had been obtained (114). The People produced a list on order of the Court of the convictions which resulted from information given by the informant and in which of those cases a search warrant was obtained (114-115) but declined to order the District Attorney, to disclose the identity of the informant or the contents of the informant registry (117).

Viera produced two search warrants obtained as a result of the informant's aid on prior occasions which resulted in the arrest of four persons. However, the Court, refused to allow defense counsel to examine the documents (126-130).

Viera informed the Court that he had made five hundred narcotics arrests and in the course of making these arrests secured several hundred search warrants (132-133). The detectives stated that when applying for a warrant he alleged that the informant had provided information in the past that resulted in arrests and/or convictions (133-134). The Court denied a request for a list of convictions based on information furnished by this information. Viera then became uncertain as to how many convictions were obtained through the informant. He thought he recalled seven cases in which convictions resulted from the informant's information of which five or six of these cases were still open (134-137). Viera then testified that he did not keep a list of every tip given by the informant but that the Narcotics Bureau maintained a confidential file of informants and the information received which is never disclosed (140-142).

Viera then testified that he did not see the car come across the Williamsburgh Bridge but saw the car exiting from the bridge (148-149). This was in conflict

with the witness' testimony before the Grand Jury where he said he saw the car cross the bridge (149-150).

He did not remember the Chevrolet having two doors or four doors (152) and again stated that he was uncertain which of the two males in the car was the driver and neglected to note this in the arrest record (152-153).

Viera was then queried as to the description of the male given. Viera was uncertain and evasive as to whether the description of the man given by the informer fit either of the males in the car or the man CEPARO, but finally stated that it was LEYVA who fit the description (157-159).

Viera then described the arrest card. Only the informant's number is placed on the arrest card which is then forwarded to the "Front Office" (164-166). Even so defendants were not permitted to examine the arrest cards. The Court also declined to allow examinations of Viera's affidavit for warrants in other cases where the informant provided information, but would examine the affidavits and arrest cards privately (184-186).

Viera was also unsure of the color of the car. The vehicle said by the informant to be gold colored was described by Viera in his arrest record as

and in his testimony as "greenish gold", "a bluish color that I would term gold", "a greenish color", "green and gold, it is mixed" and the "color appeared to be golden and green". (199-200).

Martin H. Hershey, Assistant District Attorney in charge of the Narcotics Bureau stated that on September 22, 1971, at 2:00 P.M. Detective Viera received a telephone call in his office (275-278). Mr. Hershey stated that he spoke with the caller, whose voice he recognized and was told that a 1969 gold Chevrolet with Florida license plates would be on the Brooklyn side of the Williamsburgh Bridge at 4:00 P.M. that day, that CARMEN GARCIA and one male, 5'10", 165 pounds with a dark face would be in the car and that a package of cocaine in a brown manila envelope would be found in the car (281-284).

Hershey stated that at the scene he saw Viera remove a brown manila package after removing one of the occupants of the car and that the defendant LOWE was the driver of the car (299-307).

He stated that the informant had given information that resulted in arrests and conviction prior to September 22, 1971 and cited four such instances (303, 305, 312). This statement was received over objection that Detective Viera and not Mr. Hershey effected the

arrests (309-312). The Court once again indicated, its decision to protect the identity of the informant (306-307).

During his conversation with the informant Mr. Hershey said he was informed of the basis of the informant's information, that the Cornish Arms Hotel was mentioned, that the informant had seen the Cocaine and that the informant knew CARMEN GARCIA and has seen but did not know the one male who was to be accompanying her (331-333, 348-351). No other male was ever mentioned. Mr. Hershey conceded that he did not attempt to secure a search warrant although the Supreme Court was in session at the time (390-391). Mr. Hershey stated that he had known the informant for three years and believed he was uncompensated (402-404).

After Detective Viera was briefly put back on the stand to identify the packages of cocaine, Patrolman James Mullaly of the Police Laboratory testified that he chemically analyzed the contents of the two envelopes of powder and found cocaine to be present (427-428, 432).

Viera returned to the stand and produced arrest cards based on the informant's information. However, the Court precluded defense counsel from examining the arrest cards even with the informant's number and name blocked out on the ground that the disclosure would "jeopardize" an informant whom the People alleged was productive (540-542).

Viera conceded again that the only name given by the informant was CARMEN GARCIA'S and that the arrest of the others was effected incidentally to the defendant GARCIA'S arrest (553-554). The witness also did not recall whether the information by the informant which led to other arrests specifically referred to some or all of the persons arrested or whether, as in this case, one arrest was incidental to another (555).

The Court thereafter declared that it had examined the affidavits and search warrants in the other cases in which the informant supplied information, noted that convictions had resulted after unsuccessful motions to suppress, and ruled, over strenuous objection, that it would not allow defense counsel to examine them because of the risk of disclosing the informant's identity (558-563, 568-570).

Thereafter, the witness repeated his assertion that the information leading to the defendant's arrest was secured from the informant whose information led to the arrest of four other persons (576).

The Court rules that the warrantless search was proper (635).

THE TRIAL TESTIMONY

At the trial Detective Viera's testimony generally paralleled his testimony at the suppression

hearing but with some notable exceptions. At the trial Viera said the manila envelope was black and not brown as he stated at the hearing (715). He also conceded that his testimony at the hearing regarding the absence of writing on the envelope was in error. At trial he stated that in the corner of the envelope was printed the return address of a Florida company (719-821). The witness also testified that no fingerprints were found following analysis of the inside part of the envelope (722).

During cross examination the Court allowed no testimony with reference to the informants telephone call or as to why the police were at the bridge (723-733).

Patrolman James Mullaly of the Police Laboratory testified, as he had at the hearing, that cocaine was present in the white powder in the plastic envelopes (757-763). On cross examination the patrolman conceded that he analyzed the remaining portion (765). Detective McLean testified that at 2:00 P.M. on September 22, 1971 he was in the office of Assistant District Attorney Hershey with Detective Viera, Lieutenant Gabriel Stefania and Detective Edward Codelia, left the office with these persons at 3:20 P.M. and proceeded to the Brooklyn side of the Williamsburgh Bridge (797-799). At that location he observed a 1969 gold colored Chevrolet with Florida license plates (801). The witness went on to state that

he observed someone in the car whose name he knew (802). Detective McClean then described the arrest of the defendant in a manner similar to Detective Viera (307-815). Defendant LOWE was identified as the driver of the car (812). Detective Codelia asserted that he recognized a person in the car (835).

Lieutenant Gabriel Stefania of the Police Department Narcotics Bureau testified as to his role in the arrest of the defendants. He, too, with Detectives Viera, McClean, and Codelia was at Mr. Hershey's office on September 22, 1971 and left with them that afternoon to the location noted by his brother officers on South Fifth Street, where the arrest took place (837-839).

Assistant District Attorney Martin H. Hershey testified as he did at the hearing and was in accord with the testimony of the police officers.

JOSE LOWE, was the next witness. He stated that he was 46 years old, married, with three children, and had lived in Cuba where he was in the restaurant business until 1965 (922-924). He stated that he had never been convicted of a crime either in Cuba or in the United States and had been continuously employed from the time of his arrival in the United States until his arrest (929). Permits enabling JOSE LOWE to work in bars in Union City and Miami were introduced for identification

(927-929, 931-932) and there was evidence that he worked for the Federal Bureau of Investigation for one week (932).

The witness testified that he resided in New Jersey at first, moved to Florida in June, 1970 and returned to New York City on the night of September 21, 1971 (926, 929-930, 932-933). On the morning of the next day, September 22 at about 11:00 A.M. he was proceeding to the bus terminal to go to New Jersey when he met Ceparo at 42nd Street and Broadway (935-936). Ceparo had been a customer in a Florida Restaurant where LOWE had worked (936-937). Lowe accepted an offer of a ride from Ceparo who said he first had to do an errand and took Lowe to a Hotel in the twenties (937-938). At the hotel Lowe waited, at Ceparo's request, behind the driver's wheel until Ceparo emerged from the hotel with Garcia and Leyva, who Ceparo said were friends of his (938-939). Lowe had never seen Garcia or Leyva before (939). Ceparo asked that Lowe do him a favor and take Garcia and Leyva to Brooklyn (939). Lowe then drove to Brooklyn following Garcia's directions and the arrest thereafter occurred. (939-940). The witness testified that he did not see a manila package in the car, was not told by Ceparo where he was going, was not paid by Ceparo to go to Brooklyn and did not know that drugs were in the car (940-941, 946-947).

On cross examination Mr. Lowe stated that the

car was a Chevrolet with Florida plates but did not know the year of the car (947). It then became known that Mr. Hershey had obtained a statement from Mr. Lowe after the arrest (948). The Court rejected the People's attempt to use this statement for impeachment purposes since the statement was neither signed nor sworn to by Mr. Lowe (951-963). The statement was to be used by the District Attorney only as a "memo" of the conversation (961).

The cross examination of the witness continued. Mr. Lowe denied the District Attorney's allegation that he drove the car from 43rd Street and Broadway and that Garcia and Leyva joined him at that location. (965-966). The witness asserted that he only drove from the hotel in the twenties to Brooklyn, that Carmen Garcia, whose name he did not know at the time, was seated next to him directing him and that he crossed a bridge which name he did not know since he had never been in Brooklyn before (966-968). He also indicated that he was taken by the police to the District Attorney's office in a car other than the Chevrolet (976-979) (986) and that he did not see any manila envelope until he arrived at the District Attorney's Office (981-984).

On re-direct examination Mr. Lowe stated that he had been employed as a cook and manager of a restaurant until September 19, 1971 (987).

A motion by Mr. Lowe's counsel to have the District Attorney produce the informer as part of his defense was denied by the Court (988).

Detective Viera then returned to testify as a rebuttal witness. He testified that at the time of the arrest Garcia remained in the car while Lowe and Leyve were removed (994-995), that he had the manila envelope in his hand, that he spoke about the envelope with Mr. Low nearby, that the defendants were driven to the District Attorney's Office in the Chevrolet with the Florida plates and that during this trip the envelope was on his lap (994-998).

On cross examination the detective conceded that he never specifically showed the envelope to Jose Lowe or to the other defendants (1001).

The District Attorney then asked the witness whether Ceparo had prior convictions for drugs, whether he knew that Ceparo was a "large scale dealer from Cuba" and whether Ceparo had a case pending against him in Manhattan. Objections to all these questions were sustained (1010-1011). Lowe moved for a mistrial based on the inflammatory effect of the District Attorney's groundless questions to Lowe whether he was making a large drop of narcotics in Brooklyn and whether Ceparo was a big time narcotics pusher (1013). The motion was denied by the Court (1014). The appellant Leyva and

defendant Garcia did not testify.

The District Attorney then summed up. He expressed his belief: "There's no doubt this crime occurred on September 22, 1971" (1126). He described the police arrangement at the place of arrest as a "stakeout" (1126-1127) and raised the question "What do you think these police officers were doing there?" (1128). Defense counsel were then accused of confusing the jury by questioning the absence of fingerprints (1135) and the prosecutor offered his own opinion that it was not necessary to take fingerprints (1137).

The District Attorney stated quite emphatically that the defendants must come forward to rebut the presumption in this case (1141). Even after objection the District Attorney continued to state that the presumption must be rebutted by something that emanates and comes from the defendants (1142).

The District Attorney went on to characterize defendant's as "large scale pushers" (1145). He also asserted that whereas the defendants were interested parties in the case the police officers and Mr. Mershey were "not interested in the outcome of this case". (1147).

Upon petitioner's conviction in Supreme Court,

Kings County, an appeal was taken with the Appellate Division, Second Department, which unanimously affirmed the judgment of conviction. Subsequent to this appeal, but before appeal was taken with the Court of Appeals, petitioner had strong reason to believe that there had never been an informant, as detective Viera and McClean and Assistant District Attorney Hershey had testified at both the suppression hearing and trial; but rather than the information was obtained by these parties through the use of an illegal wire-tap. On November 22, 1974 detective Viera and McClean were indicted for: 1) Wilfully conspiring to injure, oppress, threaten, and intimidate citizens in the exercise of their rights under the laws of the United States; 2) using their authority as police officers to appropriate money to themselves and to arrest others and hold them in custody, thereby depriving them of their rights without due process of law and; 3) unlawfully intercepting a wire-tap under 18 U.S.C. Sections 241, 242, 371, 2511 (1)(a) and 2. The detectives were convicted and sentenced to 9 years imprisonment. Sentence has not been executed as they are now cooperating with Federal Authorities.

Petitioner believes that Assistant District Attorney Hershey testified under a grant of immunity before the Grand Jury. These facts were presented on the subsequent appeal to the Court of Appeals but that Court elected not to hear the issues presented by these new facts. The Court of Appeals affirmed the conviction in spite of this.

POINT I

THIS COURT HAS JURISDICTION
BECAUSE PETITIONER HAS
EXHAUSTED STATE REMEDIES

In order to invoke the machinery of 28 U.S.C. Section 2254, the petitioner must have exhausted all state remedies. 28 U.S.C. Section 2254 (b) and (c); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). The Supreme Court held in Picard v. Connor, 404 U.S. 270 (1971) that before federal habeas corpus relief is available to a state prisoner, the state courts must have had "first opportunity" to consider the constitutional issue raised in the federal proceeding. The Second Circuit recently expounded on this when it stated:

....where the record shows that a state prisoner has raised an issue on appeal, then a proper exhaustion of state remedies has taken place, irrespective of whether an appellate opinion has been written indicating this fact. United States ex rel. Ross v. LaVallee, 448 F.2d 552, 554 (2d Cir. 1971); United States ex rel. Cardo v. Cassoles, 446 F.2d 632 (2d Cir. 1971); United States ex rel. Williams v. Zolker, 445 F.2d 451, 454-455, (2d Cir. 1971).

United States ex rel. Loeson v. Damon, 496 F.2d 718, 721 (2d Cir. 1974).

The exhaustion requirements applies only to direct state appeals and not to collateral post-conviction.

relief. United States ex rel Ross v. La Vallee, 443 F
2 522 (2nd Cir. 1971).

Petitioner, in the case at hand, has met these requirements for each of the issues presented since each was raised on appeal to the Court of Appeals. The fact that the Court of Appeals elected not to hear certain issues is immaterial since they were given the opportunity to consider them. Therefore, this court has jurisdiction over this case, under the federal habeas corpus statutes.

POINT II

THE USE OF PERJURED TESTIMONY
AGAINST PETITIONER VIOLATES HIS
RIGHT TO DUE PROCESS.

The petitioner's right to due process was denied by the State's use of what we now may strongly presume to have been perjured testimony. When public officers knowingly acquiesce in the use of perjured evidence their misconduct denies a defendant due process, Napue v. Illinois, 360 U.S. 264 (1958); Eysler v. Florida, 315 U.S. 411 (1941); Mooney v. Holohan, 294, U.S. 103 (1934).

In the unusual circumstances of the case at bar, a member of the state's prosecuting office, Assistant District Attorney Hershey, was not only involved in the prosecutorial aspects of the case but also in the arrest of the petitioner.

At the petitioner's trial not only did the police officers give perjured testimony but Mr. Hershey also testified to give credit to the officer's testimony. As a result it is petitioner's belief that the prosecutor's office knowingly acquiesced in the use of perjured testimony and a member of its staff was the one who, the petitioner believes, actually gave the perjured testimony. Clearly this action falls within the purview of the rule set out by the Supreme Court. If a state, whether by the

active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law. Mooney v. Holohan, 294, U.S. 103, Hysler v. Florida, supra at 413 (1941). To deny petitioner's writ would, in effect, be condoning such conduct by prosecutors.

However, even if this was not grounds for granting petitioner's writ it would seem that the use of perjured testimony against the petitioner, absent prosecutorial knowledge would also constitute a violation of petitioner's right to due process. In Curran v. Delaware, 259 F2 707, 3rd Cir. (1959) cert den 358 U.S. 948, the Third Circuit held that false testimony knowingly given by a police officer was grounds for granting a writ of habeas corpus irregardless of prosecutorial knowledge. In the case at hand not only is it the petitioner's contention that police officers Viera and McClean gave false testimony, but, as stated previously, another state officer, Assistant District Attorney Hershey may have also contributed false testimony.

However, we recognize that the perjured testimony must be more than harmless error but must be of such character as to render the proceedings fundamentally unfair, Bute v. Illinois, 333 U.S. 64 (1947). In the

case at hand the significance of the parties who gave false testimony is apparent. Besides being the parties who actually apprehended the petitioner while he was "possession" (See Point IV) they were also the recipients of the information leading up to the arrest. As a result not only were they the State's main witnesses at the trial but Assistant District Attorney Hershey and Detective Viera gave significant testimony at the suppression hearing. Based on these facts petitioner's right to due process was denied and his writ should be granted.

POINT III

PETITIONER WAS DENIED HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE

The petitioner's Fourth Amendment right was denied by his illegal arrest and the search pursuant to that arrest. An illegal arrest alone is not grounds for setting aside a conviction unless the trial was thereby rendered unfair, such as by the use of evidence which was the fruit of the illegal arrest and therefore similarly tainted. Ardister v. Hooper, 500 F₂ 233 (5th Cir. 1974); Green v. United States, 460 F₂ 317 (5th Cir. 1972); Edwards v. Swenson, 454 F₂ 1106 (8th Cir. 1972); Brooks v. Smith, 429 F₂ 1281 (5th Cir. 1970); Abraham v. Wainwright, 407 F₂ 826 (5th Cir. 1969).

In the case at hand, petitioner was arrested pursuant to an illegal wiretap. Pursuant to that illegal arrest a search was conducted of the automobile that petitioner was in. This search resulted in the discovery of the drugs that petitioner was ultimately convicted of being in "possession" (See Point IV) of. Clearly the fruit of the illegal arrest and search pursuant thereto, the drugs, was the evidence which was used to convict petitioner. As a result, petitioner's Fourth Amendment right was violated and a writ should be granted.

POINT IV

NEW YORK PENAL LAW
SECTION 220.25
VIOLATES PETITIONER'S
RIGHT TO DUE PROCESS

New York Penal Law Section 220.25 * provides
"The presence of a dangerous drug in an automobile,
other than a public omnibus, is presumptive evidence
of knowing possession thereof by each and every person
in the automobile at the time such drug was found".

It has long been recognized that a statutory
presumption which operated to shift the burden of proof
to the defendant unless he produced rebuttal evidence
might be unconstitutional, Leary v. United States, 395
U.S. 6 (1958); United States v. Roman, 382 U.S. 136
(1965); United States v. Gainey, 380 U.S. 63 (1964);
Tot v. United States, 319 U.S. 463 (1942); Cf. Note,
2 St. Mary's L.J. 115, 118, (Collecting cases). In a
series of early cases the Court required that there be
a rational connection between the facts which are
proved and the one to be inferred from the presumption
Tot v. United States, supra at 469; United States v.
Gainey, supra, at 65. Later in elaborating on this in
Leary v. United States, supra, at 36, the Court stated
that a rational connection required a "substantial

* The section has since been amended so as to restrict
its application in certain situations.

assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend". The issue here then, is whether there is a substantial assurance that the fact presumed, namely that there is knowing possession by each and every person in an automobile where a dangerous drug is found, is more likely than not to flow from the fact proved, the presence of a dangerous drug in that automobile.

The Supreme Court decision in United States v. Romano, supra is very helpful in deciding this issue. There the Court held that presumption of possession of a still from the fact of presence at a still was a violation of due process.

Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt - "the inference of the one from proof of the other is arbitrary.." Tot v. United States, 319 U.D. 463, 467. United States v. Romano, supra at 141.

Similary in United States ex rel Murphy v. Warden of Clinton Prison, 29 F. Supp. 486 (N.D. N.Y. 1939), it was held, although a Writ of Habeas Corpus was denied on other grounds* that a New York Statute which presumed possession of a machine gun from proof that the person was

* The District Court refused to overrule the state appellate

present in any room, dwelling, structure or vehicle
(emphasis added) where the machine gun was found was
invalid.

Surely it shocks the conscience and
reason to presume an innocent and law-
ful occupant of some other part of a
building to be guilty of possessing
a deadly weapon like a machine gun of
which he has never seen or heard of
and of which he knows nothing of such
presumption arising from the mere pre-
sence of an innocent person in the
structure. United States ex rel Murphy
v. Warden of Clinton Prison, supra at
493.

In applying these considerations to the case
at bar, it is manifest that New York Penal Law Section
220.25 violates the Fourteenth Amendment. The statute
here puts too much reliance on presence at a place
where a dangerous drug has been found. It subjects every
innocent party who enters into an automobile to the
possibility of proving their innocence if such a drug is
found. There are just too many reasons why a person is
present in an automobile to say with "substantial assurance"
that knowing possession of a drug is "more likely than not
to flow" from presence in an automobile where the drug has

*court's decision upholding the constitutionality of the
statute even though it was clear that the District Court
believed the statute was unconstitutional. The District
Court held if a State's Appellate Court was going to be
overruled it was the duty of the Second Circuit to do it. The
Second Circuit affirmed the denial of the writ without reaching
the issue of the constitutionality of the statute (108 F2 861,
2nd Cir, 1939). The passage of 28 U.S.C. Section 2254 and the
exhaustion of state remedies doctrine have rendered these
considerations immaterial.

been found. Petitioner was therefore denied his
Fourteenth Amendment right to due process and a writ
of habeas corpus should be granted.

C O N C L U S I O N

WHEREFORE, the Petitioner respectfully prays
that the Court grant him a Writ of Habeas Corpus, or in
the alternative, a hearing be held to determine whether
the witnesses against the Petitioner presented knowingly
false testimony.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

WIDELTO LEYVA, :

Petitioner, :

-against- :

76 C 131

SUPERINTENDENT, Green Haven :

Correctional Facility. :

Respondent. :

-----X

MEMORANDUM ORDER

Petitioner seeks a writ of habeas corpus following his conviction, with two co-defendants, of criminal possession of dangerous drugs (1st and 4th degrees) after a jury trial in State Supreme Court, Kings County. He is presently serving a sentence of 15 years to life imprisonment. The judgment of conviction was unanimously affirmed by the Appellate Division, 360 N.Y.S.2d 596 (1974), and, in a written opinion, by the Court of Appeals, 38 N.Y.2d 160, 379 N.Y.S.2d 30 (1975).

Petitioner's first claim is that his conviction was obtained through the prosecutor's knowing use of

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perjured testimony.¹ Specifically he charges that the detectives and an assistant district attorney who participated in his arrest falsely testified in a suppression hearing before trial, and at trial, to their use of an informant when in fact there was no informant and an illegal wiretap was the source of their information.

Before a constitutional claim may be asserted on federal habeas corpus, however, the federal claim must first be fairly presented to the State courts. Picard v. Connor, 404 U.S. 270, 275-76 (1971). A careful review of the papers submitted does not support petitioner's contention that this due process claim was presented to the State court. Petitioner, in arguing to the New York Court of Appeals that the identity of the informant whose information had supplied probable cause for the arrest should have been disclosed, pointed out that the detectives who testified were, at time of the appeal, under federal or State indictment.² This statement merely attacked their credibility and did not charge perjury.

Petitioner's cause is not helped even if he did not learn until after his appeal to the Court of Appeals of



the possibility of perjury. He may still move in the Supreme Court to vacate judgment on grounds of the knowing use of material false evidence. See N.Y.Crim.P.L. §440.10, the statutory counterpart to a writ of coram nobis. People v. Zimmerman, 10 N.Y.2d 430, 224 N.Y.S.2d 2 (1962); People v. McElroy, 11 App.Div.2d 556, 200 N.Y.S.2d 442 (1960). If the State refuses to hear his claim, then petitioner may rightfully turn to the federal court. United States ex rel. Leeson v. Damon, 496 F.2d 718, 721 (2 Cir. 1974). But until the avenue of relief in the State court is exhausted, federal habeas corpus is unavailable. See Sitaraki v. State of New York, 358 F. Supp. 617 (W.D.N.Y. 1973); cf. United States ex rel. Rohrlach v. Wallack, 251 F. Supp. 1009 (S.D.N.Y. 1966). Petitioner's request for an evidentiary hearing on this claim must therefore be denied.

Petitioner's second claim, that he was denied his fourth amendment rights, is again based on his contention that his arrest and the search of the car were the products of an illegal wiretap, rather than the use of a reliable informant, as had been the testimony at trial. This claim must await determination by the State court of the perjury

Finally, petitioner claims that the application of the following statutory presumption denied him due process of law:

"The presence of a dangerous drug in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found." N.Y. Penal L. §220.25.⁶

The constitutional defect asserted is that the statute lacks a rational connection and impermissibly shifts the burden of proof on an element of the offense to the defendant to disprove it.

Respondent argues that petitioner failed to raise the issue of the constitutionality of the presumption in the State court and may not do so de novo on habeas corpus. Although petitioner objected at trial on due process grounds to use of the presumption, his brief to the New York Court of Appeals claimed simply that the prosecutor's comments with respect to defendant rebutting the presumption and the judge's explanation constituted reversible error.

The Court of Appeals recognized, however, that "[t]he thrust of defendants' objections is clearly directed

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toward what they consider the inherent unfairness of the statutory presumption." 38 N.Y.2d at 104, 379 N.Y.S.2d at 33. Indeed, that court upheld the statute after review of the relevant United States Supreme Court cases before proceeding to discuss the defendants' arguments regarding its application to the facts of the case. Thus even though the petition on its face appears defective, the constitutionality of the statute has actually been ruled upon. Petitioner has sufficiently exhausted his State remedies. See also Stubbs v. Smith, 533 F.2d 64 (2 Cir. 1976).

Before the jury were the following salient facts.⁵ Four New York City Detectives and an assistant district attorney testified at trial that they left the District Attorney's office in two cars at about 3:15 p.m. on September 22, 1971, and proceeded to the Brooklyn side of the Williamsburgh Bridge. When a 1969 gold-colored Chevrolet with Florida license plates appeared, they moved to intercept it and stopped the vehicle. The automobile contained three occupants, later identified as the driver Low, Carman Garcia, sitting in the middle seat, and petitioner Leyva, sitting in the passenger seat. The detectives testified they recognized

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Garcia. Detective Viera testified that he pulled petitioner from the passenger side of the car and then retrieved a brown manila envelope, which he had seen on opening the car door, from the floor of the car. It protruded about 4 to 5 inches from underneath the front seat and had been between Garcia and petitioner. The envelope contained two packets of powder with more than a pound of cocaine.

The driver, co-defendant Low, testified as to his lack of knowledge of the presence of the cocaine. He stated that he had arrived in New York from Florida the previous day for employment purposes, and had met an acquaintance at Broadway and 42nd or 43rd Street who offered him a ride to New Jersey where he was heading. His friend stopped the car in front of a hotel somewhere in the 20's to do an errand and went into a hotel. The friend came out with Garcia and petitioner and asked Low to drive them to Brooklyn, which Low did. The "friend" did not accompany them. Neither Garcia nor petitioner testified or called any witnesses.

The validity of a presumption in a criminal case must meet a strict standard. Due process requires at least substantial assurance that the presumed fact be "more likely

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than not" to flow from the proven facts, Leary v. United States, 395 U.S. 6, 36 (1969), and might even require satisfaction of the reasonable doubt standard in some situations. Barnes v. United States, 412 U.S. 837, 843 (1973). See United States v. Tavoularis, 515 F.2d 1070, 1075 n. 11 (2 Cir. 1975).

Related to the validity of a presumption is the State's constitutional obligation to prove each element of an offense beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1969). Where one element is sought to be proved through the aid of a presumption, that element, it may be argued, should necessarily meet the test of proof beyond a reasonable doubt.

The constitutional test, as applied to the facts in this case, is whether presence of a large quantity of cocaine — over a pound — in an automobile was sufficient for a rational juror to find knowing possession of the drug by petitioner, as one of three occupants of the automobile, beyond a reasonable doubt.

For the reasons which follow, the court holds that the presumption of New York Penal Law §220.25 passes constitutional muster in that the jury could find beyond a

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reasonable doubt that petitioner knowingly possessed cocaine.

Whether a presumption meets the requisite standard of reliability depends upon the particular circumstances of its use. Thus, in United States v. Gaine, 380 U.S. 63 (1965), the Supreme Court upheld a statute which permitted unexplained presence at an illegal still sufficient to support an inference that defendant was committing the offense of illegally carrying on the business of a distiller. Yet, in United States v. Romano, 382 U.S. 136 (1965), a statute which provided that the same presence at a still could support an inference of possession or control of the still, was struck down as allowing too tenuous a connection given the narrower scope of the offense and the absence of any showing of defendant's function at the still.

So too, in Leary v. United States, *supra*, the Court held that possession of marijuana was insufficient to prove defendant's knowledge that it had been illegally imported, and similarly, in Turner v. United States, 396 U.S. 398 (1970), with respect to cocaine, given the significant quantities of those drugs domestically produced.

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However, also in Turner, the Court upheld the statutory presumption with respect to knowledge of importation of heroin, given the factual basis that virtually all heroin is imported. Finally, in Barnes v. United States, 412 U.S. 837 (1973), the Court upheld the common law inference of guilty knowledge that goods were stolen from the unexplained possession of recently stolen goods.

Whereas statistical analysis provided the factual basis in Leary and Turner which precluded any rational inference that it was more likely than not that a possessor of marijuana or cocaine knew those drugs to be imported, but that in the case of heroin a possessor must know, in this instance common experience must be relied on to support the inference. Cf. Barnes v. United States, *supra*. The statute here is directed to the not uncommon situation in which several individuals are jointly involved but none of whom have clear-cut dominion over contraband. To deal with that situation, the legislature determined that it could be said with a high degree of probability that all occupants of a vehicle are culpably involved when drugs are found secreted in the vehicle and the quantity is large. While recognizing

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that an innocent person might also be found in the car, it was viewed as unlikely that persons transporting dealer quantities of drugs would drive around with innocent friends or pick up strangers.

The facts indicate that the paradigm situation is present here. A large quantity of cocaine was found protruding from underneath the front seat of the automobile. Petitioner was found to have been in such a position as to have had the drug within his dominion or control, jointly with the other occupants. The rational connection is strong. An automobile is a confined space, subject to the control of its occupants. Whatever the case when a small quantity is found secreted in an automobile, this court finds it highly unlikely, as did the legislature, that those transporting a dealer's quantity of cocaine would permit anyone not connected with the drug to accompany them.⁶ Indeed, the testimony indicates that petitioner was not a stranger to the situation.

As construed by the Court of Appeals, the presumption here of knowing possession is permissive in nature, permitting, but not requiring, the jury to find the defendant

guilty. People v. Leyva, supra, 38 N.Y.2d at 168 & n. 3, 379 N.Y.S.2d at 37 & n. 3. In effect, the presumption operates as an instruction to the jury that an inference of knowing possession may be drawn from the fact of unexplained presence in an automobile with illegal drugs. This permissible inference may be rebutted by any evidence in the case, including the inherent or developed incredibility of the prosecution's witnesses, as well as by the defendant's own testimony. Id. at 167, 379 N.Y.S.2d at 36. See also People v. Lemmons, ___ N.Y.2d ___, 387 N.Y.S.2d 97, 100 (1976). In light of that construction of the statute and the common sense notions which support the inference, it cannot be said that the statute impermissibly shifts the burden of proof to the defendant. Under these circumstances the presumptive inference of knowing possession is a rational one flowing from the very facts involved, and is so strong as to warrant a jury finding petitioner guilty beyond a reasonable doubt in the absence of any contradictory evidence.

Accordingly, the petition for habeas corpus is denied.

SO ORDERED.

The Clerk of Court is directed to forward a copy of this memorandum order to petitioner's attorney, Louis R. Rosenthal, Esq., 16 Court Street, Brooklyn, N.Y.; and to the Attorney General for the State of New York, attention Rhonda Ankraut Bayer, Esq.

/s/ EDWARD P. NEAHER
U. S. D. J.

Dated: Brooklyn, New York
March 4, 1977

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FOOTNOTES

¹ As a general statement of law, a conviction procured through the knowing use of perjured testimony is fundamentally unfair and deprives the defendant of due process of law if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Manus v. Illinois, 360 U.S. 264, 269 (1959), and cases cited therein. See also Bennally v. DeChristoforo, 416 U.S. 637 (1974); Miller v. Pate, 385 U.S. 1 (1967).

² Petitioner argued:

"As the credibility of Detective Viera and the other officers is in question, the Court's attention is respectfully directed to the fact that Detectives Viera, McLean and Cordelia are all under state or federal indictment for extortion, bribery and violation of the Civil Rights Act in connection with the [sic] police activities." Brief of Appellant Leyva to the New York Court of Appeals, p. 23.

³ Absent the perjury issue, petitioner's fourth amendment claim was fully and fairly litigated in the State court and is therefore precluded on habeas corpus. Stone v. Powell, ___ U.S. ___, 96 S.Ct. 3037 (1976). Nor was disclosure of the informant's identity constitutionally required, even if his information formed the sole basis for probable cause of the arrest. Mapp v. Warden, 531 F.2d 1167, 1173 (2 Cir. 1976).

⁴ The statute continues with the following exceptions not applicable here:

"[S]uch presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful

and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the drug and not being under duress, is authorized to possess it and such drug is in the same container as when he received possession thereof, or (c) when the drug is concealed upon the person of one of the occupants."

A 1973 amendment to the statute substituted the phrase "controlled substance" for "dangerous drug."

- 5 No testimony as to the use of the informant was given at trial. At the suppression hearing before trial, a detective testified that a reliable informant telephoned the District Attorney's office at 2:00 p.m. that day and informed him that, at 4:00 p.m., a 1969 gold-colored Chevrolet bearing Florida license plates would appear at the Brooklyn side of the Williamsburgh Bridge, that Carmen Garcia, known to the officer as a drug trafficker, and another man he described would be in the car, and that they would have a kilo of cocaine in a brown manila envelope.
- 6 In this connection, compare Turner v. United States, *supra*, with United States v. Gonzalez, 442 F.2d 608 (2 Cir. 1971). In the latter case, the Second Circuit found that the large quantity of cocaine in the possession of the defendant could support the inference of knowledge of importation, notwithstanding Turner, in which a very small quantity was involved.

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAR 7 1977

TIME AM

PM

WIDELTO LEYVA,

Petitioner,

v.

JUDGMENT

SUPERINTENDENT, Green Haven
Correctional Facility,

76 C 131

Respondent.

A memorandum and order of Honorable Edward R. Neaher,
United States District Judge, having been filed on March 7, 1977, denying
the petition for a writ of habeas corpus, it is

ORDERED and ADJUDGED that the petitioner take nothing
of the respondent and that the petition for a writ of habeas corpus is denied.

Dated: Brooklyn, New York
March 7, 1977

Lucas Orgel
Clerk

(63)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAR 11 1977

TIME A.M.
P.M.

----- X
WIDELTO LEYVA,

Petitioner,

-against-

SUPERINTENDENT, Green Haven
Correctional Facility,

Respondent.
----- X

76 C 131

NOTICE
OF
APPEAL

S I R S :

PLEASE TAKE NOTICE that the Petitioner herein hereby
appeals from an order of this Court (Neaher, J.) entered on
March 4, 1977.

Dated: Brooklyn, New York
March 10, 1977

Yours etc.,

Louis R. Rosenthal

• LOUIS R. ROSENTHAL
Attorney for Petitioner
16 Court Street
Brooklyn, New York 11241
(212) 855-2600

TO: Clerk
United States District Court
Eastern District of New York
Brooklyn, New York 11201

Attorney General
State of New York
2 World Trade Center
New York, N. Y.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED

CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

WIDELTO LEYVA,

Petitioner,

TIME A.M.

JUN 27 1977

* 76 C 131

-against-

P.M. NOTICE OF MOTION

SUPERINTENDENT, Green Haven
Correctional Facility

S I R S :

PLEASE TAKE NOTICE that upon the annexed affirmation of LOUIS R. ROSENTHAL, and all the proceedings had herein, the undersigned will move this Court (Neaher, J.), on the ~~28~~ day of July, 1977 at the Courthouse, 225 Cadman Plaza East, Brooklyn, New York, at 10:00 a.m. in the forenoon, or as soon thereafter as counsel may be heard, for a certificate of probable cause for appeal, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

Dated: Brooklyn, New York
June 23, 1977

Yours, etc.

LOUIS R. ROSENTHAL
Attorney for Petitioner
16 Court Street
Brooklyn, New York 11241
(212) 855-2600

TO: Clerk
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Attorney General
State of New York
2 World Trade Center
New York, N. Y. 10047

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

WIDELTO LEYVA,

Petitioner,

76 C 131

-against-

AFFIRMATION

SUPERINTENDENT, Green Haven
Correctional Facility

----- X

STATE OF NEW YORK
COUNTY OF KINGS

LOUIS R. ROSENTHAL, an attorney duly admitted to practice in the Courts of this State, and the United States District Court for the Eastern District of New York, affirms under penalty of perjury, the following:

I am the attorney for the above named petitioner.

I make this affirmation in support of the within motion for a certificate of probable cause for appeal to enable the petitioner to appeal from a memorandum order of the United States District Court for the Eastern District of New York (Neaher, J.), which denied petitioner's petition for a writ of habeas corpus.

Petitioner raised three grounds, to wit:

- 1) The Prosecutor's knowing use of perjured testimony
- 2) An illegal wiretap leading to stop and search
- 3) Unconstitutionality of the statutory presumption as to possession of dangerous drugs in an automobile

The Court ruled that the petitioner had not exhausted his state remedies with respect to the first two grounds. With respect to the third ground, the Court ruled that the presumption

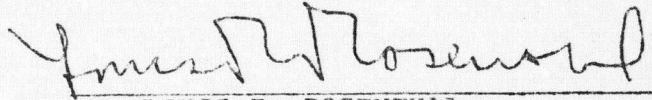
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... is constitutional.

It is my belief that the challenge to the statutory presumption in this case presents questions of such a constitutional magnitude that the ruling of the Court should be reviewed by the Circuit Court of appeals.

WHEREFORE, it is respectfully requested that the motion for a certificate of probable cause for appeal should be granted.

Dated: Brooklyn, New York
June 23, 1977


LOUIS R. ROSENTHAL

(67)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES ex rel. WIDELTO LEXVA, :

Petitioner, :

-against-

SUPERINTENDENT, Green Haven Correctional Facility, :

Respondent. :

MAILED 11
P.M.
AFFIDAVIT IN OPPOSITION
TO MOTION FOR
CERTIFICATE OF PROBABLE
CAUSE

76 Civ. 131 (ERN)

-----X
STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARK C. RUTZICK, being duly sworn, deposes and
says:

1. I am an Assistant Attorney General in the office
of LOUIS J. LEFKOWITZ, Attorney General of the State of New
York, attorney for the respondent Superintendent of the
Green Haven Correctional Facility. This affidavit is
submitted in opposition to the petitioner's motion for a
certificate of probable cause to appeal the denial of his
petition for a writ of habeas corpus. The Court denied the
petition in a memorandum order dated March 4, 1977.

2. In his petition as construed by the Court,
petitioner presented three claims. First, he asserted that
his conviction was obtained through the prosecutor's knowing
use of perjured testimony. The Court held that petitioner
had not exhausted his state remedies on that issue. Petitioner's
second claim was that his Fourth Amendment rights were violated
by his arrest and the search of the car he was riding in.
The Court found that petitioner also had not exhausted on
this claim, which appears dependent on his first claim.

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3. Petitioner's final claim was a due process challenge to the statutory presumption contained in N.Y. Penal Law § 220.25, which provides:

"The presence of a dangerous drug in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found."

The Court found that this presumption is valid and does not offend due process.

4. Petitioner now seeks a certificate of probable cause to appeal the denial of his writ. His support for this application lies solely in the bare affirmation of his attorney expressing his opinion that the statutory presumption issue in this case merits appellate review.

5. The motion for a certificate should be denied for several reasons. First, as petitioner's counsel appears to recognize, there is no serious issue for appeal concerning the Court's dismissal of petitioner's first two claims for failure to exhaust state remedies. Petitioner apparently does not even want to challenge the Court's disposition of those two claims. Thus, petitioner should first return to state court with the claims he has never before presented to them, and seek his release on those grounds.

6. The principles of comity underlying the federal courts' review power in state habeas corpus proceedings, see Picard v. Connor, 404 U.S. 270 (1971), and basic principles of judicial economy require that petitioner utilize all his available state court remedies relating to the claims in his federal petition prior to even considering appellate review.



convince the state courts of the merits of his claims the federal courts would never be called upon to decide the single issue which is now ripe for federal consideration. Conversely, if petitioner fails with his claims in state court, he will no doubt pursue those claims anew in federal court. To allow appellate review at this stage would bifurcate his federal proceeding, and produce unnecessary expense of the time of the Court of Appeals and the attorneys involved. Thus it cannot at this time be said that petitioner asserts "federal questions adequate to deserve encouragement to proceed further." United States ex rel. Jones v. Richmond, 245 F 2d 234 (2d Cir.), cert. denied 355 U.S. 846 (1957). If petitioner presents all his claims to the state courts and fails to prevail on those claims, he then can pursue all his federal claims in a single proceeding, and seek appellate review at that time if warranted.

7. Further, even aside from these sound reasons for denying the certificate, petitioner has not raised any issue on the merits warranting further consideration by the federal courts. The rebuttable presumption he challenges falls squarely within the scope of permissible presumption as enunciated by the Supreme Court in Barnes v. U.S., 412 U.S. 837 (1967). See Gent v. Commissioner, 421 F. Supp. 557 (S.D.N.Y. 1976). The New York Court of Appeals has authoritatively interpreted this presumption as permissive only, and there is no conceivable doubt that a jury could find knowing possession from the fact of defendant's unexplained presence in an automobile with more than one pound of cocaine. With two courts (this Court and the New York Court of Appeals) having already reviewed the facts and upheld the conviction, petitioner has shown no reason why yet a third court should perform the same task.

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8. For the foregoing reasons the motion for a certificate of probable cause should be denied.

Mark Rutzick
MARK RUTZICK

Sworn to before me this
21st day of June, 1977

Kenneth J. McPhay
Assistant Attorney General
of the State of New York

(71)

FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D.N.Y.
AUG 14 1977
TIME AM.....
P.M.....

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
WIDELTO LEYVA, :
 :
 : Petitioner, :
 :
 : -against- :
 :
 : SUPERINTENDENT, Green Haven :
 : Correctional Facility, :
 :
 : Respondent. :
-----X

76 C 131

MEMORANDUM ORDER

By Memorandum Order dated March 4, 1977, the court denied petitioner's application for a writ of habeas corpus. He now seeks a certificate of probable cause for appeal. Rule 22, F.R.A.P. Petitioner's application is granted.

One of the issues raised in the petition, and dealt with on the merits, concerns the constitutionality of the statutory presumption of knowledge of dangerous drugs found in an automobile. N.Y. Penal L. §220.25. Application of this presumption or inference was critical to the State's prosecution of petitioner. Petitioner's contention that the statute is unconstitutional as a deprivation of due process is certainly

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far from frivolous and, accordingly, a certificate of probable cause shall issue.

.SO ORDERED.

The Clerk of Court is directed to send a copy of this order to the attorney for the petitioner and to the Attorney General of the State of New York, attention Rhonda Amkraut Bayer, Esq.

Edward R. Nealey

U. S. D. J.

Dated: Brooklyn, New York
July 28, 1977